INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Blount v. *Rizzi*, 400 U.S. 410	9, 10, 11, 12
Cafeteria and Restaurant Workers Union v. *McElroy*, 367 U.S. 886	9, 11
Dash v. *Commanding General*, 307 F. Supp. 849, affirmed, 429 F. 2d 427, certiorari denied, 401 U.S. 981	5, 6, 8, 9
Eisner v. *Stamford Board of Education*, 440 F. 2d 803	11
Flower v. *United States*, No. 71-1180, decided June 12, 1972, reversing 452 F. 2d 80	7, 8
Freedman v. *Maryland*, 380 U.S. 51	9, 11, 12
Kiiskila v. *Nichols*, 432 F. 2d 745	6
Lloyd Corp. v. *Tanner*, No. 71-492, decided June 22, 1972	8
Schneider v. *Laird*, 453 F. 2d 345, certiorari denied, No. 71-1271 (June 12, 1970)	6, 7
Tinker v. *Des Moines School District*, 393 U.S. 503	12
Weissman v. *United States*, 387 F. 2d 271	9
Yahr v. *Resor*, 431 F. 2d 690, certiorari denied, 401 U.S. 982	6

Statute and regulations: Page

18 U.S.C. 1382 7
Army Regulation 210-10, ¶ 5-5 .....2, 3, 4, 5, 6, 8, 9, 10, 11
Department of Defense Directive, Regulation No. 1325.6 9

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-145

DAVID NOLAND, ET AL., PETITIONERS

v.

WILLIAM R. DESOBRY, COMMANDING GENERAL, UNITED STATES ARMY ARMOR CENTER, FORT KNOX, KENTUCKY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is not reported. The order of the district court granting partial summary judgment (Pet. App. 3a) and the final order and judgment of the district court (Pet. App. 7a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1972. The petition for a writ of certiorari was filed on July 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Army Regulation 210-10 (Pet. App. 14a), permitting the Commanding Officer of a military installation to deny permission to distribute publications on a military base if in his judgment the publications present "a clear danger to military loyalty, discipline, or morale," is unconstitutional.

STATEMENT

1. Petitioners, enlisted servicemen stationed at the Army Armor Center, Fort Knox, Kentucky, publish and distribute off-base an underground newspaper, *In Formation*. In April, 1970, after first distributing two issues on the base in violation of Army regulations, petitioners formally applied to the base commander for permission to distribute *In Formation* in the company areas on the base (App. 36, 54, 93; Supp. A. 6).[1] Acting under Army Regulation 210-10, ¶ 5-5c, and a local implementing regulation (Pet. App. 14a-18a), the base commander denied the request in May, 1970 (Pet. 4; Pet. App. 4a).

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[1] The references are to the Appendix and Supplemental Appendix filed in the court of appeals.

The base commander then forwarded the request for distribution, and an explanation of his reasons for denying it, to the Department of the Army, as required by AR 210-10, ¶ 5-5d (Pet. App. 9a, 15a). Permission to distribute issue number two had been denied because the base commander determined that "the publication's advocacy of the demands of the American Servicemen's Union [ASU] constituted a clear danger to the military loyalty, discipline, and morale of his command" (Pet. App. 4a). These demands, prominently displayed in issue number two of *In Formation*, included "An end to saluting and sir-ing officers—lets get off our knees," "Election of officers by vote of the men," and "The right to disobey illegal orders—like orders to go and fight in an illegal war in Vietnam" (App. 73). The commanding officer concluded that "no military installation could continue to function if these goals were achieved" (App. 55). Specifically, the base commander pointed out that because the principal responsibility of the Army Armor Center was to train new enlistees for service in Vietnam, the advocacy of "programs aimed at modifying the Army's organizational structure * * * at this point in their training would, in my opinion, impair the morale and discipline of these trainees, limiting or destroying the value of subsequent training" (App. 55-56).[2]

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[2] The base commander also concluded that "any attempt to publicize" these demands would be met by a hostile and possibly violent reaction from "a significant number of the personnel" assigned to the Armor Center, especially non-commisssioned officers (App. 56, 101).

The Department of the Army sustained the denial of distribution as to issue number two, but permitted the distribution of issue number one (Pet. App. 9a). The base commander was informed that he was authorized "to place reasonable restrictions on the time, place and method of distribution to insure that the amount of distribution does not [materially] interfere with the accomplishment of the military mission" (App. 81). Petitioners were then informed that they could distribute issue number one on a date of their choosing, at four specified locations, but that personal solicitation of trainees would not be permitted (App. 38-39).[3] The decision to limit distribution to one day was "in no way questioned" by petitioners (App. 101).

2. On October 20, 1970, prior to final action by the Department of the Army on their request, petitioners commenced an action against their Commanding Officer seeking judicial review of his decision, made pursuant to Army Regulation 210-10, to bar distribution of issues number one and two of *In Formation*. The complaint also challenged the validity of Army Regulation 210-10, ¶ 5.5. (On the basis of the Army's subsequent approval, issue number 1 was later distributed on the base.)

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[3] Issue number one was distributed on December 12, 1970 (Pet. App. 10a). On March 1, 1971, petitioners requested permission to distribute issue number five of *In Formation* on the base. The base commander recommended that distribution be approved, and on March 30, 1971, the Army authorized distribution of issue number five (Pet. App. 10a).

On April 13, 1971, the district court granted partial summary judgment to the government. The court upheld the constitutionality of Army Regulation 210-10, ¶ 5-5 under *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981. After personally "examin[ing] the publication in question" (issue number two), the district court held that the base commander had not acted unreasonably or unconstitutionally in barring its distribution. The court found that "advocacy of such ASU demands as the right to elect officers by popular vote and the right to disobey orders to serve in Vietnam are totally incompatible with the maintenance of military loyalty, discipline, and morale. As to such we do not believe reasonable men could differ" (Pet. App. 4a-5a).

The court subsequently held an evidentiary hearing on petitioners' remaining contentions. It found that the restrictions imposed on distribution of issue number one were reasonable,[4] that no unreasonable

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[4] Petitioners' veiled suggestions here of harassment of their activities in distributing issue number one (Pet. 5-6) are based entirely upon petitioner Noland's direct testimony at the trial. The district court, which heard Noland testify, expressed serious reservations as to his credibility (Pet. App. 11a), and commented following the trial that Noland had, on at least one occasion, attempted "to create an impression of arbitrariness and disregard of his rights on the part of the military which he admits did not happen." (App. 32). Petitioners' allegations that "military police [were] stationed at the paper's distribution points," attempting to identify servicemen taking copies (Pet. 6), is likewise supported only by Noland's testimony that he had heard about such activity a week after distribution from unidentified sources. Noland

delay took place in responding to the distribution requests since the publications dealt with general issues, not "time is of the essence" news, and that petitioners' claims that they were entitled to a hearing before distribution was banned were without merit (Pet. App. 7a-13a). The court of appeals affirmed, one judge dissenting, on the findings, conclusions and opinion of the district court (Pet. App. 1a-2a).

ARGUMENT

1. The constitutionality of Army Regulation 210-10, ¶ 5-5, which permits a commanding officer to bar distribution on a military base of publications whose distribution "presents a clear danger to the loyalty, discipline, or morale of troops at his installation," has been repeatedly sustained against challenges similar to those raised by petitioner, here. See *Schneider* v. *Laird*, 453 F. 2d 345 (C.A. 10), certiorari denied, No. 71-1271 (June 12, 1972); *Dash* v. *Commanding General*, 307 F. Supp. 849 (D. S.C.), affirmed, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981; *Yahr* v. *Resor*, 431 F. 2d 690 (C.A. 4), certiorari denied, 401 U.S. 982.[5]

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did not personally observe anyone stationed at the distribution points. Counsel objected to such testimony as hearsay and the district court agreed (App. 128).

[5] There is no conflict among the courts of appeals. *Kiiskila* v. *Nichols*, 433 F. 2d 745 (C.A. 7), upon which petitioners rely, involved the exclusion of a civilian employee from a naval base because she had distributed anti-war literature near the base. The case did not involve the validity of Army Regulation 210-10, ¶ 5.5.

Flower v. *United States*, No. 71-1180, decided June 12, 1972, upon which petitioners here rely, does not hold to the contrary. That case, decided summarily on the same day the Court denied certiorari in *Schneider*, *supra*, involved the criminal conviction of a civilian under 18 U.S.C. 1382 for violating a military order barring him from entering a military post. At the time of his arrest he was quietly distributing leaflets, announcing an off-base meeting on the Vietnam war, on what the Court viewed as a major, heavily used, "public street" that happened to traverse the Fort Sam Houston military reservation. The Court concluded that "under conditions like those" in that case Section 1382 of the Federal Criminal Code could not constitutionally be applied to punish a civilian for pamphleteering on a "public street."

The instant case, however, like *Schneider*, involves the scope of permissible administrative regulation by military authorities of the distribution of disruptive publications by military personnel to other military personnel in military areas of an army base. Moreover, while Fort Knox, like Fort Sam Houston, is an open fort, and while the public is not physically barred from the company areas, those areas and others on the fort cannot be equated with the public thoroughfare in *Flower* which was "an important traffic artery used freely by buses, taxi cabs, and other public transportation facilities," and the sidewalks of which were "used extensively at all hours of the day [and night] by civilians as well as military personnel". *Flower* v. *United States*, *supra*,

quoting *United States* v. *Flower*, 452 F. 2d 80, 90 (C.A. 5), dissenting opinion. See also *Lloyd Corp.* v. *Tanner*, No. 71-492, decided June 22, 1972.

2. Petitioners' attack upon AR 210-10 and the Fort Knox implementing regulation (Pet. App. 14a-18a) as "overbroad" is without merit and is fully answered by the opinion in *Dash* v. *Commanding General*, 307 F. Supp. 849, 845-855 (D. S.C.), affirmed on the district court opinion, 429 F. 2d 427 (C.A. 4), certiorari denied, 401 U.S. 981. There Judge Russell held:

> The regulation must be read * * * in conjunction with the opinion of the Judge Advocate instructing authoritatively the Post Commander in the exercise of his powers under AR 210-10, paragraph 5-5e. By these instructions, the Post Commander is required to make specific findings in support of any restriction imposed by him under the Regulation. Specifically, he is advised against any denial based on "good taste" or "in the best interests of the command" and is instructed that he may delay distribution of a publication "only if he determines that the specific publication presents a clear danger to the loyalty, discipline, or morale of his troops." He is commanded that he "may not prevent distribution of a publication simply because he does not like its contents" and "The fact that a publication is critical—even unfairly critical—of Government policies or officials is not in itself, a ground for denial." The constitutionality of the regulation must be determined on the regulation as construed and defined in these instructions issued by the Judge Advocate, controlling the applica-

> tion by the Post Commander of the regulation. See the concurring opinion of Justices Black and Douglas in Gregory v. City of Chicago (1969) 394 U.S. 111, 113, 89 S.Ct. 946, 22 L.Ed.2d 134, and concurring opinion of Justice Harlan in Shuttlesworth v. City of Birmingham (1969) 394 U.S. 147, at p. 159, 89 S.Ct. 935, 22 L.Ed.2d 162. * * *

The court in *Dash* held that the Regulation (and a local implementing regulation), as limited by these instructions (Pet. App. 24a), was not impermissibly broad and indefinite. That decision is correct and equally applicable here. Cf. *Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886; *Weissman* v. *United States*, 387 F. 2d 271, 273-274 (C.A. 10). A reading of AR 210-10 ¶ 5-5, and the implementing regulation (Pet. App. 14a-18a), in context with the Army Adjutant General's instructions and definitions (Pet. App. 24a-32a), and with the Defense Department's directive (Pet. App. 19a-23a), shows the Army has established a system carefully designed to protect special military needs and responsibilities with a minimal impact on constitutionally protected interests.

3. Petitioners, relying upon *Blount* v. *Rizzi*, 400 U.S. 410, 417, and *Freedman* v. *Maryland*, 380 U.S. 51, argue (Pet. 13) that "the regulatory requirements and time limitations which a censorship regime must afford" are lacking in Army Regulation 210-10, ¶ 5-5.[6] The cases cited by the petitioners in-

[6] Petitioner's major objection appears to be that the regulation fails to guarantee a prompt determination of an application for permission to distribute material. The regulation

volved censorship of allegedly obscene materials intended for general dissemination to the public. The Court in that context held (*Blount* v. *Rizzi*, 400 U.S. at 417):

> [T]o avoid constitutional infirmity a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require "prompt judicial review" —a final judicial determination on the merits within a specified, brief period—to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination. * * *

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does, however, provide that concurrent with the imposition of the delay in distribution authorized by Army Regulation 210-10, ¶ 5-5, the commander will inform the next major commander and Headquarters, Department of the Army, and request approval to prohibit distribution of the publication. Paragraph 5-5(d) of the regulations provides that "[t]elephonic communication will be used in each instance" and that if the document at issue is unlikely to be available it should be dispatched "by the fastest available means". The Regulation is thus not insensitive to the desirability of prompt decision. While the initial decision on issues one and two did take an extended period of time, there is nothing in the record to indicate that such delays are commonplace. Indeed, the district court found that the delay occurred because the administrative procedures were new and the request novel (Pet. App. 12a-13a). Permission to distribute issue number five was granted within 30 days of submission of the application. The court also noted that there was no particular damage resulting from the delay because the publications involved ideological submissions, not "time of the essence news" (Pet. App. 12a).

The instant case, however, involves only a limitation on the distribution of materials within the confines of a military installation. Petitioners were not prohibited by Army Regulation 210-10, ¶ 5.5, from printing the materials on their own time and at their own expense and distributing them outside the confines of the installation. There is a significant distinction between action undertaken by the government in regulating the armed forces and the operations of military installations, on the one hand, and action restricting the general dissemination of materials by private citizens to the public. As the Court held in an analogous case (*Cafeteria and Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896):

> [T]he governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment. * * *

The imposition here of the standards set out in *Blount* v. *Rizzi*, 400 U.S. 410, 417, and *Freedman* v. *Maryland*, 380 U.S. 51, would place an unwarranted and unjustified burden on the ability of a military commander to maintain order and discipline on the installation. Petitioners are unable to cite any case which goes so far.[7]

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[7] *Eisner* v. *Stamford Board of Education*, 440 F. 2d 803, 807 (C.A. 2), cited by petitioners (Pet. 13), involved the dissemination of a newspaper in a school, an institution which

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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is " 'a market place of ideas' " and in which "exposure to * * * robust exchange of ideas" plays an essential role. *Tinker* v. *Des Moines School District*, 393 U.S. 503, 512. But even there the court of appeals declined to apply all of the limitations which *Freedman* v. *Maryland*, *supra*, and *Blount* v. *Rizzi*, *supra*, held were essential in cases involving materials intended for general public distribution (440 F. 2d at 810).

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